

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Exclusive Service Contracts for Provision of	)	MB Docket No. 07-51
Video Services in Multiple Dwelling Units and	)	
Other Real Estate Developments	)	
	)	

**HOTWIRE COMMUNICATIONS, LLC'S REPLY COMMENTS**

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## INTRODUCTION

Hotwire Communications, LLC (“Hotwire”) hereby submits its Reply Comments to comments submitted by various parties in this proceeding including but not limited to Verizon, Comcast Corporation (“Comcast”), and AT&T, Inc. (“AT&T”). Verizon and AT&T believe that the Commission has the authority to and should prohibit new exclusive contracts and enforcement of existing exclusive contracts. Verizon suggests a “narrowly tailored and time-limited” rule that would prohibit new exclusive contracts and enforcement of existing contracts for five years and then sunset.

As Hotwire stated in its Comments, Hotwire currently competes with large incumbent franchised cable operators (“MSOs”) in particular MDUs and private residential communities (collectively “MDUs”). The only way small cable operators such as Hotwire can compete is if they are able to ensure a return on investment through exclusive agreements with MDU owners and homeowner associations (collectively “Associations”) for a certain period of time. Even a prohibition of five years, as suggested by Verizon, would make it impossible for Hotwire to compete. Large MSOs such as Comcast, Verizon, and others with millions of voice, Broadband Internet, or video customers and hundreds of millions of dollars in annual revenues would be able to continue to offer broadband and video services without the benefit of exclusive contracts.

However, to small cable operators such as Hotwire, a ban of five years would force Hotwire out of the communications and video market during such period. Rather, Hotwire would look to other business opportunities for investment of its resources. Certainly, eliminating an albeit small, but aggressively competitive segment of the market would be inconsistent with the Commission’s goals of fostering competition, and requirements to protect small cable providers.

### **Exempting Small Cable Providers**

As a preliminary matter, it is significant to recognize that none of the parties that submitted comments complained that they could not compete because of exclusive contracts entered by small cable operators such as Hotwire. As Hotwire indicated in its initial Comments, it serves a very small portion of the market and all small cable operators combined serve a very small percentage of the total residential video service market. Comcast maintains that if the Commission does decide to restrict exclusive contracts, it should treat all providers equally. However, Comcast's comments are directed to Verizon and AT&T and argue that because providers bundle voice, video and Internet services, looking at market power solely in terms of video is not appropriate. (Comcast's Comments at 11-14). Comcast does not address small cable operators. Thus, it does not appear that larger providers such as Verizon, AT&T, Comcast or other large cable operators would have an issue with excluding or exempting small cable operators such as Hotwire from regulations governing exclusive contracts.

While Hotwire supports exempting small cable operators from any regulations regarding exclusive contracts that may be adopted, providers with market power in either telephone *or* video service should not be exempted. Because typical contracts now address bundled services including voice, video and data, Incumbent Local Exchange Carriers ("ILECs") easily may use their market power over telephone service to exclude other providers of other services and gain competitive advantages in MDUs. Thus, while small cable operators should be exempt from any Commission regulation of exclusive contracts, such exemption should not extend to ILECs.

Further, the Commission acknowledged in the NPRM that exclusive contracts may be either pro-competitive or anti-competitive depending on the situation (NPRM ¶2).

Hotwire submits that in the case of small cable operators that cannot make the significant investment to overbuild and to compete with MSOs and ILECs for cable and high speed Internet customers, exclusive contracts are always pro-competitive. The Commission recognized its obligation under the Regulatory Flexibility Act to determine the effect of its proposed rules on small cable operators and to take steps to eliminate such impacts, including but not limited to exempting such small cable operators from such rules.<sup>1</sup> Hotwire submits that it and other small cable operators would quite simply not continue to compete in the video market if they were unable to enter into exclusive contracts for cable service with MDUs. Accordingly, to eliminate this negative impact of its proposed rules on small cable operators, the Commission should exempt small cable operators from any rules it may adopt with respect to exclusive contracts with MDUs.

#### **Distinction Between Exclusive and Bulk Contracts**

It seems that the Commission in the NPRM and several parties that submitted comments view exclusive and bulk contracts as interchangeable, while others point out the distinction between bulk contracts and exclusive contracts. As Hotwire stated in its initial Comments, nearly all of Hotwire's contracts are bulk contracts, whereby Hotwire sends one billing invoice to an Association for certain cable, VoIP, and/or high speed Internet services and provides such services to all residents of the Association. The Association's members (homeowners) then pay for such services in their homeowners' assessments. Because of the guarantee that 100% of the residents subscribe to such bulk services, and the lower service costs that accompany providing service on a bulk basis, Association residents obtain bulk services at substantial discounts from retail rates. In addition, in a bulk contract, the Association and Hotwire will describe with specificity the

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<sup>1</sup> NPRM Appendix, ¶17. As noted in its initial comments, since Hotwire serves less than 400,000 subscribers nationwide, it is a "small cable operator." Hotwire is also not affiliated with any entity with annual gross revenues in excess of \$250 million. See NPRM Appendix, ¶¶10, 11.

services being provided on a bulk basis. Such terms will typically include a specific channel lineup, particular premium channels or advanced cable services that will be offered as part of the bulk service, particular upload/download Internet speeds, particular features offered with VoIP service, as well as other services Hotwire will provide to the community, such as a community channel, security channel, and free services to a clubhouse and other common areas, and commitments for responding to service problems.

Occasionally, Hotwire and Associations will enter into an exclusive marketing agreement for a particular service whereby Hotwire has certain rights to market such service with the Association's assistance within the community. However, an exclusive marketing agreement in Hotwire's experience, is always accompanied by a bulk contract for certain other services. For example, it is not uncommon for an Association to enter into a bulk contract for cable service and an exclusive marketing contract for Internet service and/or VoIP service. Where an Association enters an exclusive contract for the provision of service to an MDU, the exclusive contract will not contain discounted rates or provide for specific services that will be provided. Examining the substance of bulk contracts demonstrates that these are the product of arms length negotiations, at least with smaller cable operators such as Hotwire, typically in a very competitive situation. Consumers under such contracts receive significant benefits that they would not otherwise be able to obtain if they subscribed on their own to services. Further, developers of MDUs recognize the value of such bulk contracts when selling their units. Such bulk contracts represent significant, bargained for terms and conditions. Because of the significant business differences between bulk and exclusive contracts, such contracts should not be viewed as interchangeable for purposes of any Commission regulation.

There are also legal differences between exclusive and bulk contracts. Congress expressly authorized bulk contracts in the Cable Television Consumer Protection and Competition Act of 1992. Section 523(d) provides, in pertinent part:

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.... Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit.

47 U.S.C. §523(d). Accordingly, federal law expressly authorizes Hotwire to enter into bulk contracts. Courts have recognized the ability of cable operators and Associations to enter into bulk contracts. See, e.g., Marco Island Cable Inc. v. Comcast Cablevision of the South, Inc., 2007 U.S. Dist. Lexis 16597 (M.D. Fla. 2007); Northview Terrace Association v. Mueller, 2002 Wash. App. LEXIS 584 (Ct. App. (Wash.) 2002). Further, States' laws expressly authorize condominiums and other MDUs to enter into bulk contracts for the provision of cable services and to have such fees treated as common expenses. See, e.g. Section 718.115, Fl. Statutes (condominium association may enter into contract for cable or satellite master antenna television system and such expenses shall be a common expense); Section 719.107(1)(b), Fl. Statutes (cooperatives may enter into contract for cable or satellite master antenna television system and such expenses shall be a common expense); Section 721.13(3)(j), Florida Statutes (vacation and timeshare plans may enter into bulk contract for cable service).

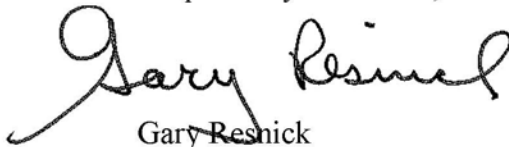
As Hotwire pointed out in its Comments, because of States' mandatory access laws such as Florida's, and franchised cable operators' ability to use compatible utility easements in private communities, even if a provider has an exclusive contract with an MDU or Association, a competitor may still be able to provide service. Thus, bulk

contracts are more common.<sup>2</sup> Because of the Commission's lack of authority to prohibit bulk contracts, and the practical, business differences between exclusive and bulk contracts, it is important that the Commission understand the important differences between exclusive and bulk contracts in any rulemaking it may pursue.

### **Conclusion**

For the foregoing reasons, Hotwire respectfully submits that the Commission exempt small cable operators such as Hotwire from any rules it adopts with respect to exclusive contracts for cable services with MDUs. Further, Hotwire respectfully requests that the Commission not take any action that would impact Hotwire's ability to enforce or to enter into bulk contracts with MDUs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary Resnick". The signature is fluid and cursive, with the first name "Gary" and last name "Resnick" clearly distinguishable.

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<sup>2</sup> For example, it is Hotwire's understanding that Verizon, as well as all of the cable MSOs have entered into bulk contracts for cable services covering millions of residential units and such providers, as well as AT&T have similar bulk contracts for high speed Internet service.